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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1031

LEONARD TONASKET,

Appellant

v.

THE STATE OF WASHINGTON AND THE SUPERVISOR OF THE TAX COMMISSION OF THE STATE OF WASHINGTON

Appellees

BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT

INTEREST OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE

Appellant and Appellees have filed with the Clerk of this Court a written stipulation consenting to the filing of this brief. Amicus has a considerable interest in the outcome of this case and is particularly qualified in the specialized area of Indian law.

Native American Rights Fund (hereinafter referred to as the "Fund") is a private, non-profit corporation organized for the purpose of and dedicated to protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance to Indians. Because of the Fund's expertise on Indian law, the Fund also provides counsel to legal services

programs on Indian legal matters under a contract with the Office of Economic Opportunity. The Fund participates as amicus curiae in this case because of the impact the decision in this case will have on the scope of Federal supervision of Indian tribes located in states which have assumed criminal and civil jurisdiction over certain Indian reservations.

STATEMENT

The Colville Confederated Tribes comprise eleven separate tribes of Indians which formerly occupied large areas of Eastern Washington until they were placed upon the Colville Indian Reservation established by Executive Order of the President of the United States in 1872. The tribes are recognized by the United States Government, Bureau of Indian Affairs, and are governed by a Constitution and By-Laws approved by the Secretary of the Interior on December 26, 1938. The Colville Indian Reservation encompasses 1.3 million acres and is governed by the fourteen member Colville Business Council.

In 1963, Leonard Tonasket, a full-blooded enrolled member of the Colville Confederated Tribes, leased a store in East Omak on the Colville Indian Reservation and established a retail business, selling cigarettes and other merchandise. On April 9, 1964, Leonard Tonasket applied to the Tribal Loan Office for a loan of federally restricted trust funds in the sum of $1,000 specifically for the purchase of a larger cigarette inventory. The Bureau of Indian Affairs for the Portland Area Office approved the cigarette inventory loan in the sum of $800 and a mortgage upon Mr. Tonasket's trust allotment S-2026 was given to secure the loan, all pursuant to the provisions of 25 C.F.R. §§ 91.12 *et seq.* Thereafter, Leonard Tonasket borrowed an additional $6,000 from the Tribal Loan Office with which to construct

a new store building on his trust allotment to expand his retail business.

Because he is a full-blooded enrolled member of the Colville Confederated Tribes operating a retail store on his trust land as a Federal Indian trader within the meaning of 25 U.S.C. § 261 *et seq.* and because he was utilizing Federally restricted funds, Leonard Tonasket did not register with the State of Washington or affix tax stamps to cigarettes in his possession and being sold in his business.

In February of 1967, agents of the Washington Tax Commission entered the Colville Indian Reservation, seized a great number of cigarettes from Leonard Tonasket's trust land, and placed him under arrest for failing to register with the Tax Commission in violation of RCW 82.32.030 and RCW 82.32.290, possessing unstamped cigarettes in violation of RCW 82.24.050 and RCW 82.24.110, and selling unstamped cigarettes in violation of RCW 82.24.050 and RCW 82.24.110.

As a result of the action of the Washington Tax Commission, Leonard Tonasket commenced an action in the Superior Court for Thurston County requesting a judgment declaring that he be entitled to operate his retail business on his trust land on the Colville Indian Reservation free from the provisions of the State excise statutes or from State interference, and for a judgment requiring the State of Washington to return all cigarettes illegally confiscated from his trust land. On October 7, 1968, the Superior Court of the State of Washington granted judgment in favor of the State of Washington. On September 2, 1971, the Supreme Court of the State of Washington affirmed the Superior Court's ruling. On November 15, 1971, the Supreme Court of the

State of Washington issued its *remittitur* to the Superior Court enforcing the written opinion of the court.

On December 10, 1971, appellant filed, in the Supreme Court of the State of Washington, a Notice of Appeal to this Court, which noted probable jurisdiction on June 12, 1972.

ARGUMENT

This case presents this Court the opportunity to determine if the State of Washington can validly tax a Colville Indian trader located on the Colville Indian Reservation whose business is financed through Federal and tribal economic development funds established to encourage Indian economic self-sufficiency, for the sole reason that the Colville Indian Tribe and its members have submitted to the criminal and civil jurisdiction of the State of Washington, authorized by Public Law 83-280, Ch. 505, 67 Stat. 588, 28 U.S.C. §1360 (hereinafter "Public Law 280").

The Washington Supreme Court interpreted Public Law 280 as granting states the power to impose on Indian tribes all state laws except those expressly excluded by its provisions. In this sweeping decision, the Washington Supreme Court repudiated other court opinions limiting the scope of Public Law 280 and ignored this Court's decision in *Warren Trading Post Company v. The Arizona State Tax Commission*, 380 U.S. 685 (1965) that Federal pre-emption of Indian commerce and of traders on Indian reservations prohibits the imposition of a gross proceeds tax on an Indian trader doing business on an Indian reservation.

Furthermore, the effect of the Washington Supreme Court decision is to threaten long standing economic self-sufficiency policies of the Federal government undertaken in furtherance of its special trust responsibilities for Indian

people. If the Washington Supreme Court opinion is not reversed, Federal pre-emption of Indian commerce, once exclusive and total, will wither and recede at the whim of Public Law 280 state revenue directors.

I

THE WASHINGTON SUPREME COURT IMPROPERLY CONSTRUED PUBLIC LAW 280 AS CONFERRING BROAD POWER ON THE STATE OF WASHINGTON TO TERMINATE THE FEDERAL REGULATION AND SUPERVISION OF INDIAN TRADERS

The Washington Supreme Court concluded that the State of Washington could impose any state tax on Indian enterprises so long as the [illegible] did not conflict with the exception clause, 28 U.S.C. § 1360(b), of Public Law 280. In reaching that conclusion, the Washington court improperly construed Public Law 280 as conferring on the states the power to terminate the absolute Federal pre-emption of Indian traders doing business on Indian reservations, as enunciated by this Court in *Warren Trading Post Co. v. The Arizona State Tax Commission, supra.* The Washington court attempted to distinguish Mr. Tonasket from the Indian trader in *Warren Trading Post, supra,* in order to sustain Washington state taxation, arguing that Mr. Tonasket did not have an Indian trader's license, that the Commissioner of Indian Affairs had failed to fully exercise the power to license Indian traders in the State of Washington, that Mr. Tonasket's business had a substantial number of non-Indian customers and that Mr. Tonasket's business was located on a reservation which had submitted itself to the jurisdiction of the state pursuant to Public Law 280.

There is nothing in Public Law 280 or in any other law which renders the Federal scheme for regulating Indian

traders inapplicable to Public Law 280 states.[1] If the Federal scheme is applicable to Indian traders doing business on Indian reservations in the State of Washington, the clear holding of *Warren Trading Post, supra,* is that the Federal government has pre-empted the field leaving no room for state taxation.[2]

Mr. Tonasket is an enrolled member of the Colville Confederated Tribe whose retail business is subject to the same comprehensive Federal regulation of Indian traders under 25 U.S.C. §§ 261 *et seq.* as was the enterprise in *Warren Trading Post, supra.* Because he is a full-blooded Indian, his business is exempt from the licensing requirements imposed on the enterprise in *Warren Trading Post, supra.*[3] Congress has exempted full-blooded traders from licensing regulations in furtherance of the Federal concern for the welfare of Indians and the historic Federal policy of non-interference by states in the lives of Indians. See e.g. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), *Williams v. Lee,* 358 U.S. 217 (1959). It would be odd, to say the least, for

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[1]In its *Warren Trading Post* opinion, this Court took cognizance of Public Law 280, 380 U.S. at 687, but gave no indication that the Federal scheme for regulating Indian traders did not extend to Public Law 280 states.

[2]In *Makah Indian Tribe v. Tax Commission,* 72 Wash. 2d 613, 434 P.2d 580 (1967), the Washington Supreme Court recognized that states are prohibited from taxing Indian trading on reservations and interfering with the Federal policy of control and protection, while holding that the Federal pre-emption rule of *Warren Trading Post, supra,* did not apply to non-Indian wholesalers conducting their business wholly outside of any Indian reservation.

[3]Title 25 U.S.C. § 264 provides:
Any person *other than an Indian of the full blood* who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500. . . . (emphasis supplied)

the State of Washington to jump into the breach and regulate full-blooded Indian traders leaving the Federal government to regulate only non-Indians. If the Commissioner of Indian Affairs has not fully exercised and enforced the Congressional mandate of regulating traders in the State of Washington, that fact, if it be true, cannot create a vacuum authorizing the assumption of state jurisdiction. *Cf. Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971). Congress has pre-empted the field. Neither the Commissioner of Indian Affairs nor any other administrative official can, by his action or inaction, permit a state to enter an area Congress has reserved exclusively for Federal regulation. See e.g. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926). Moreover, there is nothing in the Federal Indian trader statutes and regulations which would suggest that Federal regulation is not to encompass an Indian trader, operating on an Indian reservation, who has a substantial number of non-Indian customers or that the applicability of such Federal regulations is to be determined on a sales transaction by sales transaction basis. Indeed, implicit in the concept of Federal pre-emption is the notion that Congress and the appropriate federal agencies, and not the various states, have the power to determine the precise scope of Federal regulation.

In choosing not to follow the Federal pre-emption doctrine of *Warren Trading Post, supra,* and in permitting the taxation of an Indian trader in a Public Law 280 state, the Washington Supreme Court necessarily interpreted Public Law 280 as a termination statute, terminating, in effect, those Federal laws and policies relating to Indian traders which are applicable in non-Public Law 280 states. That Public Law 280 cannot be so interpreted is the clear holding of this Court in *Menominee Tribe v. United States*, 391 U.S. 404 (1968). In *Menominee Tribe, supra,* this Court

concluded that although the Menominee Termination Act of 1954, 68 Stat. 250, 25 U.S.C. §§ 891-902, rendered all statutes of the United States affecting Menominee Indians because of their status as Indians no longer applicable, the existence of Public Law 280 in the State of Wisconsin preserved certain Federally recognized rights intact.

Amicus contends that neither Public Law 280 nor any other Congressional enactment, in the absence of an explicit termination act, terminates the Federal pre-emption of the regulation and supervision of Indian businesses on Indian reservations. As amicus will demonstrate in Part II of this brief, the legislative history, existing judicial interpretation, and present Congressional and Executive policies all suggest that Public Law 280 should be construed as not terminating those special Federal policies and programs created to enhance Indian commerce.

II

THE CONGRESSIONAL CONFERRAL OF CRIMINAL AND CIVIL JURISDICTION PURSUANT TO PUBLIC LAW 280 SHOULD NOT BE CONSTRUED AS INCLUDING THE POWER TO TERMINATE PREVIOUSLY EXISTING FEDERAL INDIAN POLICIES

Before Congress adopted Public Law 280, the State of Washington and other states lacked the authority to extend the application of their general laws to Indian country.[4] By this Act, Congress extended to certain named states, not including Washington, jurisdiction over civil causes of action and criminal offenses occurring within Indian country in those states. With respect to the states—such as Washington —not specifically named in Public Law 280, §§ 6 and 7 of that Act provided procedures by which jurisdiction of

[4] *Worcester v. Georgia, supra. Williams v. Lee, supra.*

causes of action in Indian country could be assumed.[5] Washington acquired jurisdiction under Public Law 280 over the Colville Indian Reservation in 1965.

Although the conferral of jurisdiction was specifically limited by the exception clause of § 4 of Public Law 280, the grant of authority was vague and the full ramifications of extending civil jurisdiction over Indian reservations were apparently never fully explored. It was unclear as to what extent, if any, Public Law 280 was intended to obligate the states to substitute their laws for Federal regulation and supervision over Indian country. The exception clause of § 4 would, at the very least, suggest that Congress was concerned that Federal policies and programs regulating Indian trust property and Indian commerce incorporated in statutes and regulations, would remain in full force and effect in Public Law 280 states. Moreover, application of the legal maxim "expressio unis est exclusio alterius" would suggest that Federal laws regulating Indian commerce, such as the Federal Indian trader statutes, 25 U.S.C. § 261 *et seq.*, were not repealed by implication by the operation of Public Law 280 inasmuch as Section 2 of Public Law 280 explicitly repealed two similar Federal statutes, 18 U.S.C. 1152 (Assimilative Crimes Act) and 18 U.S.C. § 1161 (Ten Major Crimes Act) on those Indian reservations where states assumed jurisdiction.

When Public Law 280 was enacted, Congress was pre-occupied with Indian law enforcement problems. The legislative history of Public Law 280 confirms that it was designed primarily to assist certain Indian tribes in preserving law and order on their reservations. Senate Report No. 699, 83rd Cong., 1st Sess. (1953) states:

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[5]367 Stat. at 590.

> [C]onsequently, there has been created a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility. (U.S. Code Cong. & Admin. News 2412 (1953))

There is no indication in the legislative history that Public Law 280 was intended to terminate existing Federal regulation and supervision of Indian country or to indiscriminately subject Indian reservations to hundreds of state laws, particularly those laws constituting a comprehensive scheme of state taxation. Indeed, the sweeping restriction of § 4 prohibiting the alienation or encumbrance of any real or personal trust or restricted property manifests a Congressional intent not to grant to the states significant taxing powers, for the enforcement scheme of most state taxes contemplates upon non-payment the levy and seizure of real and personal property. Such an enforcement action was undertaken by the State of Washington pursuant to RCW 82.32.310 in the present instance (see Jurisdictional Statement, p. 9).

Moreover, the absence of a Congressional plan to have Public Law 280 confer on the states the authority to terminate Federal regulation and supervision of Indian commerce, to substitute their own regulation and to impose comprehensive state taxation is demonstrated by the continuation of large scale Federal assistance programs for Public Law 280 reservations[6] and by the failure of Public Law 280

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[6]In fact, extensive Federal assistance and supervision still prevails on the Colville Indian reservation. For fiscal years ending 1970, 1971, and 1972, the Bureau of Indian Affairs and the Department of Health, Education & Welfare's Indian Health Services expenditures for the Colville Confederated Tribes equaled $2,119,697, $2,188,-

states to assume the burden of providing comprehensive state services to Indians consenting to state criminal and civil jurisdiction.[7]

Although Public Law 280 could be interpretated as authorizing an expansive conferral of legislative authority, this Court in *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971), *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1961), and *Menominee Tribe v. United States, supra*, has consistently construed Public Law 280 as a limited conferral of legislative power to the states, not designed to extinguish or interfere with Federal policies regarding Indians.

In *Kennerly v. District Court of Montana, supra*, this Court concluded that the State of Montana had improperly undertaken the assertion of civil and criminal jurisdiction pursuant to Public Law 280. This Court held that it was necessary to proceed cautiously and deliberately when permitting state action to impinge on the affairs of reservation Indians, observing:

664, and $2,928,636, while parallel appropriations for the Yakima Indian Tribe in Washington which is not a Public Law 280 reservation and which has an Indian population 2.5 times the Colville population, totaled $2,700,260, $3,194,630, and $3,621,333. [Information obtained from the Portland, Oregon offices of the Bureau of Indian Affairs and Indian Health Services.]

[7]Contrary to the statement of the Washington Supreme Court (Jurisdictional Statement, p. A-10), Indians residing in the Colville Indian Reservation are not enjoying all the rights and privileges which are enjoyed by Washington citizens generally. Through June 30, 1971, the Colville Confederated Tribes had paid approximately $40,000 per annum for certain government services, not including specific police protection, provided by Okanogan and Ferry Counties of Washington (ratified by Public Law 772, 70 Stat. 626) and had paid approximately $26,000 per annum for specific police services furnished by Okanogan and Ferry Counties of Washington (ratified by Colville Confederated Tribal Resolution of September 18, 1970).

> Our conclusion . . . is reinforced by the comprehensive and detailed Congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdiction of certain States to Indian country. (400 U.S. at 427)

Similarly, in *Metlakatla Indian Community v. Egan, supra,* this Court interpreted Public Law 280 and the exception clause thereunder as providing a broad and comprehensive *exception* to the imposition of state, civil, and criminal jurisdiction. This Court stated, "This statute expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation . . ." (369 U.S. at 56) In *Menominee Tribe v. United States, supra,* this Court again construed Public Law 280, this time in *pari materia* with the Menominee Indian Termination Act of 1954. The Menominee Termination Act was by its terms to provide for the orderly termination of Federal supervision over tribal members and tribal property, but Public Law 280, although conferring civil and criminal jurisdiction on the State of Wisconsin, was nevertheless held to preserve for the Tribe all hunting, trapping or fishing rights previously granted.

Recent Congressional and Executive actions have clarified Public Law 280 as conferring limited legislative authority, not including the power to terminate Federal responsibility and supervision over Indian tribes. In 1968 Public Law 280 was amended to require tribal consent before a state can assert civil and criminal jurisdiction in Indian country, to allow assertion by a state of only a part of its civil and criminal jurisdiction and to allow states to retrocede jurisdiction previously acquired under Public Law

280.[8] The legislative history of these amendments indicates that they were initially proposed because Indian tribes had been critical of Public Law 280 because it authorized unilateral applications of state law without the consent of the tribes and without regard to special needs and circumstances of an individual tribe. Furthermore, in some tribes Public Law 280 resulted in an unnecessary pre-emption of tribal law with a resulting break-down in law and order.[9] The 1968 amendments evidence Congressional disillusion with the concept of allowing uncontrolled assertion of state jurisdiction over Indian country without regard to the best interest of Indians.

President Richard M. Nixon has taken a strong stand against previous Executive and Congressional policies favoring fundamental change in the special historical and legal relationship between the Federal government and Indian tribes.[10] Present Executive policies against termination of the special Federal Indian status and in favor of strong tribal self-government are based on solemn obligations entered into by the United States government in exchange for vast tracts of lands surrendered by Indians and on findings which show that the practical result of removing the Federal trusteeship has been to produce considerable disorientation among affected Indians in their dealings with a myriad of Federal, state and local governments.

The present Congressional and Executive policies favoring Indian self-government and the preservation of Federal responsibility are premised on the failure of recent termina-

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[8]Public Law 90-284, 82 Stat. 70 (codified as 25 U.S.C. § 1322 *et seq.* (Supp. 1969).

[9]Comments of Senator Sam Ervin, 1968 U.S. Code Cong. & Admin. News 1865, 1866.

[10]Message to Congress, July 8, 1970, 116 Cong. Rec. 23131 (1970).

tion policies. Accordingly, amicus contends that this Court should construe Public Law 280 as not conferring on the states the power to terminate Federal responsibility for the regulation of Indian traders. Moreover, amicus suggests that this Court has established a modern judicial trend limiting the assertion of state taxation of Indians, which parallels present Congressional and Executive policies designed to enhance Indian self-sufficiency. In *Squire v. Capoeman,* 351 U.S. 1 (1956) this Court established the proposition that when determining the taxability of Indians, it is necessary to determine initially whether Congress explicitly conferred the necessary taxing power and if so, whether the assertion of such taxing power interferes unjustifiably with any applicable Federal policy regarding Indian economic self-sufficiency. This Court stated:

> The courts below held that imposition of the tax here in question is inconsistent with the Government's promise to transfer the fee "free of all charge or encumbrance whatsoever." Although this statutory provision is not expressly couched in terms of nontaxability, this Court has said that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, 'The language used in treaties with the Indians should never be construed to their prejudice. . . .' " (351 U.S. at 6, 7)

This Court's decision in *Squire v. Capoeman, supra,* introduced a judicial rule requiring an affirmative showing of Congressional authorization to sustain taxability. Prior cases of this Court, in particular *Oklahoma Tax Commission v. United States,* 319 U.S. 598 (1942) and *West v.*

Oklahoma Tax Commission, 334 U.S. 717 (1947), required, in order for there to be immunity from taxation, an affirmative showing that the property was exempt by Congress from taxation. Recently, Judge Davis of the United States Court of Claims, in *Mason v. United States*, No. 417-70 (Court of Claims, decided June 16, 1972) summarized in a scholarly opinion recent developments in the area of Indian taxation and concluded that the old rule of *West v. Oklahoma Tax Commission, supra*, and *Oklahoma Tax Commission v. United States, supra*, requiring a finding of an explicit tax exemption, was no longer the appropriate test and adopted the alternative position first articulated in *Squire v. Capoeman, supra*, which measures the scope of proper taxability upon Indians by a determination of whether Congress, in the first instance, affirmatively authorized the particular tax intrusion into protected Federal Indian policies. Although *Squire v. Capoeman, supra*, involved Federal income taxes as distinguished from a state inheritance tax in *West*, or the cigarette excise tax in the present case, the rationale in *Squire v. Capoeman, supra*, of protecting the Federal policy of preserving restricted Indian assets from payment of taxes applies to death levies and excise taxes as well.

This Court's limiting interpretation of Public Law 280 is consistent with two United States Circuit Court opinions which turned directly on an interpretation of the scope of Public Law 280. In *Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957), the court considered in a Public Law 280 jurisdiction whether a trust allotment of the Agua Caliente Band of Indians was exempt from a California inheritance tax and held the allotment not taxable because taxation would conflict with existing Federal exemptions provided the Agua Caliente Indians and with the exception clause of

Public Law 280 which the court stated "[m]erely negatives the idea that any change in the law as to alienation, encumbrance, or taxation of Indian property was intended." (243 F.2d at 865). In *United States v. Burland*, 441 F.2d 199 (9th Cir. 1971), the court considered whether Public Law 280 was intended to confer Montana State criminal jurisdiction over the people as well as the lands of the Salish and Kootenai Tribes. The court construed Public Law 280 narrowly, arguing that Public Law 280 was only part of a larger Federal legislative program relating to Indians and that other separate legislation was contemplated to affect specific disabilities and limitations applicable to Indians.

The Supreme Court of Washington also adopted this Court's limiting view of Public Law 280 in *Snohomish County v. Seattle Disposal Company*, 70 Wash.2d 668, 425 P.2d 22 (1967) and in *Sohol v. Clark*, 71 Wash.2d 664, 430 P.2d 548 (1967) and on second appeal, 78 Wash.2d 841, 479 P.2d 925 (1971) requiring in each case a showing of an *independent* Congressional authorization, apart from Public Law 280, in order to sustain Washington's legislative assertion against Indian country. For some inexplicable reason the Washington court in the instant case rejected this Court's restrictive interpretation of Public Law 280 as well as abandoning its own prior decisions in concluding that the authority contained in Public Law 280 was plenary and limited only by the exceptions expressed in the act.

CONCLUSION

For the above reasons, Amicus, Native American Rights Fund, urges this Court to reverse the decision rendered against the Appellant by the State of Washington Supreme Court. We urge this Court find that the Appellant, Leonard Tonasket, is a Federally regulated and sanctioned Indian

trader and therefore is protected from the taxes assessed against him by the State of Washington. Such a finding is consistent with the language and intent of Public Law 280 to confer on the states the authority to assert laws of general applicability without terminating existing Federal Indian policies.

Respectfully submitted,

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